NO. 84-750

In the Supreme Court of the United States

OCTOBER TERM, 1984

EASTERN AIR LINES, INC.,

PETITIONER

VERSUS

ERNEST GLENN WINBOURNE,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

MAY A COURT, BY ADDING INTEREST TO A JUDGMENT, MAKE AN AWARD THAT EXCEEDS THE MAXIMUM LIABILITY LIMITATION IMPOSED BY AN INTERNATIONAL TREATY, THE WARSAW CONVENTION, AS SUPPLEMENTED BY THE MONTREAL AGREEMENT?

The United States Court of Appeals, Fifth Circuit has answered "Yes" to this question.

The United States Court of Appeals, Second Circuit, has answered "No."

This question is presently before this Court on an application for writs in *Eastern Air Lines, Inc. v. Robert F. Mahfoud, Etc.*, (No. 83-4315, 5th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3235 (No. 83-1807, October 1, 1984).

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 21.1(b) and 28.1, counsel for Petitioner certifies that the parties to this proceedings are: Ernest Glenn Winbourne and Eastern Air Lines, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Eastern Air Lines, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on August 9, 1984.

OPINION BELOW

The opinion of the Fifth Circuit appears in the attached appendix.

JURISDICTION

The Fifth Circuit entered judgment in this matter on August 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000 (*reprinted in* 49 U.S.C. §1502, T.S. No. 876, 137 L.N.T.S. 11), and more particularly, Article 22 thereof. (Hereinafter referred to as the Warsaw Convention.)

"ARTICLE 22"

> "(1) In the transportation of passengers the liability of the carrier for each passenger *shall be limited* to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of said payments *shall not exceed* 125,000 Francs...." (Emphasis added)

49 U.S.C. §1502 (Warsaw Convention)

2. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990, approved by Order No. E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966) [Montreal Agreement]:

> "[A] *limit of liability* for each passenger for death, wounding or other bodily injury of $75,000...." (Emphasis added.)

STATEMENT OF THE CASE

The instant case arises out of the crash of Eastern

Air Lines Flight 66, on June 24, 1975, at Kennedy International Airport. The action was brought on behalf of Ernest Glenn Winbourne for the deaths of his wife and two children, who were killed in the crash. The Winbournes were engaged in international travel, and were subject to the provisions of the Warsaw Convention, as supplemented by the Montreal Agreement.

Winbourne filed suit in the United States District Court, Eastern District of Louisiana, on August 25, 1975. The case was transferred to the Eastern District of New York by order of the Multi-District Litigation Panel, where it was consolidated by Judge Bramwell for trial on the issue of liability.

On the day the liability trial was to commence, Winbourne moved orally to sever his claims against Eastern, and moved for entry of judgment against Eastern, based on the Warsaw Convention as supplemented by the Montreal Agreement.

Judge Bramwell granted plaintiff's motion, despite Eastern's opposition on the ground of procedural deficiencies.

The United States Court of Appeals, Second Circuit reversed, with instructions to Winbourne that he reassert his Warsaw/Montreal motion after remedying the procedural deficiencies. Winbourne did not reurge his motion.

Judge Bramwell transferred the case back to Louisiana for a trial on damages. Once back before Judge Robert Collins, United States District Judge for the Eastern District of Louisiana, Eastern Air Lines, citing Warsaw/Montreal, moved for a judgment of liability

against it. Plaintiff, who had heretofore insisted on the applicability of Warsaw/Montreal, now opposed it on various grounds.

On March 31, 1982, Judge Collins ruled that the terms and conditions of Warsaw/Montreal were applicable.

On April 5, 1982, the court granted plaintiff's motion for summary judgment, and ruled that interest was to be awarded on the Warsaw judgment.

Eastern then confessed judgment in the amount of $225,000,00, the full amount for which it could be liable under Warsaw/Montreal, and deposited that sum into the court's registry.

Judgment limiting Eastern's liability to $225,000.00, plus interest, was entered on January 24, 1983. (Appendix A.)

The United States Court of Appeals, Fifth Circuit, citing its own decision in *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), affirmed the award of interest on a Warsaw/Montreal judgment, even though the imposition of interest would increase the award against the carrier to more than $75,000.00 per passenger seat. (Appendix B.)

On March 2, 1984, the United States Court of Appeals for the Second Circuit, ruled that, as a matter of law, the liability limitation was designed to be and is absolute, and that prejudgment interest may not be awarded if the effect is to exceed the stated liability limitation. *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2nd Cir. 1984).

This Court, on October 1, 1984, granted petitioner's

Petition for Writ of Certiorari in *Eastern Air Lines, Inc. v. Robert F. Maufoud, Etc.*, (No. 83-4315, 5th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3235 (No. 83-1807, U.S. October 1, 1984). At issue in that case is the identical question being presented in this Petition.

REASONS FOR GRANTING THE WRIT

A conflict between a decision by the United States Court of Appeals, Fifth Circuit, and a decision by the United States Court of Appeals, Second Circuit, compels issuance of a writ to resolve the question of whether a court may, by awarding interest on a Warsaw/Montreal Judgment, exceed the liability limitation imposed by the Warsaw Convention and Montreal Agreement. This Court recently granted *certiorari* on the same issue in *Eastern Air Lines, Inc. v. Robert F. Mahfoud, Etc., above.*

The decision of the Fifth Circuit Court in *Winbourne v. Eastern Air Lines, Inc.*, 83-3109 (5th Cir. 1984), directly conflicts with the decision of the Second Circuit Court in *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2nd Cir. 1984).

Each circuit considered the question of whether prejudgment interest could properly be awarded against Eastern Air Lines, consistent with Article 22 of the Warsaw Convention, when the result would be a judgment exceeding the $75,000 per seat limitation of liability.

The Fifth Circuit has ruled that the limited liability amount of $75,000 per seat, as provided by Article 22 of the Warsaw Convention, and as supplemented by the Montreal Agreement, does not preclude the award of prejudgment interest over and above that amount, if certain equitable considerations are met.

In awarding interest in this case, the Fifth Circuit has held that the district court may award interest, as it held in its earlier decision in *Domangue v. Eastern Air Lines, Inc.*, above.[1] In *Domangue*, the Court remanded the interest issue for a factual determination of who was "at fault" for the delay in bringing that case to trial. The Court held that if Eastern was at fault, then, as a matter of equity, interest could be awarded.

The Second Circuit in its *O'Rourke* opinion expressly disagreed with the Fifth Circuit, stating:

> "Moreover, we do not agree with the fifth circuit's interpretation of the Montreal Agreement. The speedy resolution of claims was apparently not an important United States objective at the conference. *See* Lowenfeld & Mendelsohn, *supra* note 15, at 572. The principal purpose of the United States at the Montreal Conference was to increase the liability limit to $100,000. The absolute liability provision was introduced as a means of getting the United States to accept a liability limit lower than $100,000, *see id.* at 563, 570-71, and was not one of the prime objectives of the American delegation. *See id.* at 572 ("The United States delegation was itself divided on [this] issue, and its instructions were not firm on the point."). Thus, the payment of prejudgment interest would not advance any of the underlying objectives of the Convention or the Agreement, but it would undercut, as we discussed above, two of the Convention's major objectives."

O'Rourke, 730 F.2d 842, 854, footnote 20.

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[1] This case also arose out of the crash of Flight 66.

Further, the Second Circuit noted that the Warsaw Convention is a treaty adhered to by the United States, and that—

> "[I]n the absence of any contrary intent on the part of the framers, we [the court] may not read into the document a provision that allows the payment of prejudgment interest above the $75,000 liability limitation." (Footnote omitted)

O'Rourke, 730 F.2d 842, 853.

The issue before the Court concerns an important federal question, with international ramifications. Its resolution will determine whether one of the fundamental concepts of the Warsaw Convention will survive.

> "Secretary of State Cordell Hull, in transmitting the Warsaw Convention to the Senate in 1934 indicated that the purpose of the liability limitation was 'to fix at a definite leve the cost to airlines of damages sustained by their passengers and of insurance to cover their damages.' *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977)".

Domangue v. Eastern Air Lines, Inc., 542 F.Supp. 643, 653 (E.D. La. 1982).

The decision by the Fifth Circuit allowing interest over and above the $75,000.00 maximum limit of damages recoverable under the Warsaw Convention/Montreal Agreement is contrary to the drafters' intent. Neither this Court nor any other federal appellate court had ever awarded interest over and above the maximum liability limitation before the Fifth Circuit did so in *Domangue, above.*

As this Court recently said in *Trans World Airlines, Inc. v. Franklin Mint Corp.*:

> "We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention's existence....
>
> ****
>
> "The conduct of the contracting parties in implementing that contract in the first 50 years of its operation cannot be ignored." (Citations omitted.)

Franklin Mint, 104 S.Ct. 1776, 1787 (1984).

If upheld, the decision of the Fifth Circuit will defeat the Warsaw Convention's specific purpose.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 75-2715
SECTION "C"

ERNEST GLENN WINBOURNE

VERSUS

EASTERN AIR LINES, INC. and
THE UNITED STATES OF AMERICA

****

JUDGMENT

This matter was tried before the Court, sitting without a jury. Pursuant to the Opinion of this Court and in accordance with the provisions of Fed. R. Civ. P. 58;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT shall be entered in favor of plaintiff, Ernest Glenn Winbourne, and against defendant, Eastern Air Lines, Inc., in the amount of TWO HUNDRED TWENTY-FIVE THOUSAND and no/100 DOLLARS ($225,000.00), plus interest from date of judicial demand.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that JUDGMENT shall be entered in favor of plaintiff, Ernest Glenn Winbourne, and against defendant, the United States of America, in the amount of SEVEN HUNDRED EIGHTY-FIVE THOUSAND SIX HUNDRED TEN and 24/100 DOLLARS ($785,610.24) with interest from date of Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants bear costs of this suit.

New Orleans, Louisiana, this the 24th day of January, 1983.

/S/ Signed
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-3109

ERNEST GLENN WINBOURNE,

Plaintiff-Appellee,

versus

EASTERN AIRLINES, INC.,

Defendant-Third Party-Plaintiff Appellant,

UNITED STATES OF AMERICA,

Third Party Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

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(August 9, 1984)

Before REAVLEY, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

The wife and two daughters of Ernest Glenn Winbourne died in the crash of an Eastern Air Lines plane in 1975. Liability is conceded by Eastern and by the United States, the employer of air traffic controllers assumed to have been negligent. The district court awarded total damages of $1,010,610.24. Of this, Eastern's liability is limited to $225,000 under terms of the Warsaw Convention and the Montreal Agreement. The United States' liability is therefore $785,610.24.

Eastern appealed the award of interest on the $75,000 per seat limitation, but that issue was decided adversely to Eastern by a panel of this court in *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984).

The United States complains that the amount of the damages is excessive. The district court assessed the damages as follows:

> 1. $500,000 for the loss of love and affection of plaintiff's wife.
>
> 2. $210,610.24 for the economic loss due to wife's death. There were two components of this economic loss: her teacher's salary and her household services.
>
> 3. $150,000 for the loss of love and affection of his 8 year old daughter.
>
> 4. $150,000 for the loss of love and affection of his 4 year old daughter.

This award was made by the trial judge in a careful and detailed opinion. The economic loss computations were based on the specific testimony of an economist. The evidence

established the unusual nature of this plaintiff's damages in the loss of his family. From a very happy family man, vigorous in his life and work, he became not only a man crushed by sudden tragedy but one who remained lost and disturbed. None of this evidence was rebutted or questioned by the defendant. We cannot upset the district court's damage findings unless we hold them to be clearly erroneous. "Because the assessment of damages for grief and emotional distress is so dependent on the facts and is so largely a matter of judgment, we are chary of substituting our views for those of the trial judge. He has seen the parties and heard the evidence; we have only read papers." *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 783 (5th Cir. 1983).

Appellant argues that Louisiana courts have not awarded comparable damages, and in *Caldarera* this court specifically held the sum of $250,000 was the maximum award that could be allowed for the emotional losses arising from the death of the wife.

We cannot judge the justification of damages by mere comparison with the awards upheld or reversed in other cases. Each case presents its own facts. *See Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La. 1976). But it is helpful to compare the *Winbourne* and *Caldarera* cases. Peter Caldarera lost his mother, wife and eight year old. His four year old son remained in his home. While this court placed a $250,000 maximum on emotional loss due to the death of the wife, we did not reduce the total award against the United States, wherein the trial judge had included $400,000 for the emotional loss of the wife. This court affirmed the total damages award of $797,021. That is about $200,000 less than the Winbourne award. Over half of that differential is represented by lost wages of Mrs.

Winbourne, a gifted teacher. This economic loss is not questioned by the United States.

So Mr. Winbourne receives an extra $100,000. But his entire family is gone. He lost his second daughter and has no son. He has no one. Furthermore, the depth of this plaintiff's devotion and identification with his family was unique and unquestioned. We are unable to say that the district judge was clearly erroneous.

AFFIRMED.